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IN THE
COURT OF APPEALS OF INDIANA

DEXTER L. BERRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0605-CR-282
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald Daniel, Judge
Cause No. 79C01-0308-FB-12

February 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Dexter Berry was convicted of Robbery, as a Class B felony, following a jury trial, and the trial court imposed a seventeen-year sentence. On direct appeal, this court affirmed Berry's conviction and upheld the sentence. Berry v. State, Cause No. 79A02-0206-CR-494 (Ind. Ct. App. January 13, 2003) ("Berry I"). Thereafter, Berry filed a motion to correct erroneous sentence, which the trial court denied. Berry appealed that ruling, pro se, and this court held that the trial court erred when it denied his motion to correct erroneous sentence, and we remanded and instructed the trial court to treat that motion as a petition for post-conviction relief. Berry v. State, Cause No. 79A02-0501-PC-54 (Ind. Ct. App. October 31, 2005) ("Berry II"). On remand, the trial court granted the petition and resentenced Berry following a hearing. Berry now presents four issues for our review, which we consolidate and restate as:

1. Whether he knowingly, voluntarily and intelligently waived his right to counsel upon resentencing.

2. Whether the trial court abused its discretion when it imposed an enhanced sentence and whether his sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

In Berry II, we stated the facts and procedural history as follows:

> On April 12, 2002, a jury found Berry guilty of robbery, as a class B felony. On May 16, 2002, the trial court sentenced Berry to seventeen years.[] The trial court found as follows:
>
> > [T]he Tippecanoe County Probation Department having filed a pre-sentence report, the Court now conducts hearing on sentencing. The Court now hears evidence and argument on

> behalf of the defendant and evidence and argument on behalf of the State of Indiana.
>
> The Court finds as aggravating factors that the defendant has a history of criminal or delinquent activity, and the defendant is in need of correctional or rehabilitative treatment that can best be provided by his commitment to a penal facility.
>
> The Court finds no mitigating factors.

(Berry's Br. 14).

> Berry appealed his sentence, arguing it was manifestly unreasonable in light of the circumstances of the crime and the character of the offender. In a memorandum decision, this court found "that Berry has a criminal record, including a felony conviction for possession of a stolen vehicle" and "misdemeanor convictions for criminal trespassing." Berry v. State, No. 79A02-0206-CR-494, slip op. at 8 (Ind. Ct. App. Jan. 13, 2003) (citing to Berry's appendix). We also found that "Berry was on probation for possession of a stolen vehicle at the time he committed this offense." Id. Accordingly, we affirmed Berry's conviction and sentence on January 13, 2003. Our Supreme Court denied Berry's petition to transfer on February 20, 2003.
>
> On December 7, 2004, Berry filed a motion to correct erroneous sentence and memorandum of law in support thereof. Berry argued that his sentence violated his Sixth Amendment right to have the facts supporting the enhancement of his sentence tried to a jury under Blakely v. Washington, 124 S. Ct. 2531 (2004) and Apprendi v. New Jersey, 120 S. Ct. 2348 (2000). The trial court denied Berry's motion, finding that there were no mitigating circumstances, and the aggravating circumstances did not implicate Blakely.

Slip op. at 2-3 (footnote omitted).

On appeal, this court remanded to the trial court and instructed the court to treat the motion as a petition for post-conviction relief. On remand, the trial court granted the petition and conducted a hearing on resentencing. At that hearing, Berry's post-conviction counsel advised the court:

> I have an appearance on file representing Mr. Berry concerning his PCR petition—the petition for post-conviction relief that he filed back in September 16, 2003. That's the only capacity that I am here today. I'm not here to represent him at sentencing, but with the court's permission I would like to stay at the table and if Mr. Berry has any questions be available to answer those questions if I could.

Transcript of Resentencing at 1. The trial court advised Berry that he was entitled to counsel and that one would be appointed if he could not afford one, but Berry insisted that he wanted to represent himself. At the conclusion of the hearing, the trial court identified a single aggravator, namely, Berry's criminal history, and imposed a fifteen-year sentence. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Right to Counsel

Berry contends that the trial court violated his Sixth Amendment right to counsel when it failed to adequately advise him of his right to counsel and the pitfalls of self-representation. In particular, he maintains that he did not knowingly, voluntarily and intelligently waive his right to counsel. We cannot agree.

The right to counsel is a constitutional right of fundamental importance which cannot be waived except by the defendant himself. Fitzgerald v. State, 254 Ind. 39, 46, 257 N.E.2d 305, 311 (1970). A decision to proceed pro se at any level is a waiver of the right to counsel, and the record must demonstrate a knowing and intelligent waiver of such right. Owen v. State, 269 Ind. 513, 517, 381 N.E.2d 1235, 1238 (1978). There is no rigid mandate which sets forth the inquiries that a trial court should make or the warnings that should be given to a defendant proceeding pro se, but it is not enough simply to make the defendant aware that he has a right to counsel. Geiger v. State, 688 N.E.2d 1298,

1300 (Ind. Ct. App. 1997). Rather, the record must affirmatively disclose that the defendant is aware of the implications, consequences, and risks of self-representation. Id. We review de novo a trial court's finding that the defendant knowingly and intelligently waived the right to counsel. Miller v. State, 789 N.E.2d 32, 37 (Ind. Ct. App. 2003).

In Dowell v. State, 557 N.E.2d 1063, 1066-67 (Ind. Ct. App. 1990), trans. denied, cert. denied, 502 U.S. 861 (1991), this court set out the following guidelines for establishing a knowing, intelligent, and voluntary waiver of a defendant's right to counsel: (1) advising the defendant of the nature of the charges against him and the possibility of lesser included offenses and mitigating circumstances; (2) advising the defendant that self-representation is almost always unwise, that he will not receive special treatment from the court, that he will have to abide by the same standards as an attorney as to the law and procedure, and that the State will be represented by experienced professional legal counsel; (3) advising the defendant that an attorney has skills and expertise in preparing for and presenting a proper defense; and (4) inquiring into the educational background of the defendant, his familiarity with legal procedures and rules of evidence, and his mental capacity.

While our supreme court has endorsed trial courts' use of the Dowell guidelines, it has also stated that those guidelines "should [not] constitute a rigid mandate setting forth specific inquiries that a trial court is required to make before determining whether a defendant's waiver of right to counsel is knowing, intelligent, and voluntary." Leonard v. State, 579 N.E.2d 1294, 1296 (Ind. 1991). In some circumstances, a trial court may infer from a defendant's conduct that he waived his right to counsel. Balfour v. State, 779

N.E.2d 1211, 1216 (Ind. Ct. App. 2002). The United States Supreme Court has stated that whether there has been an intelligent waiver of the right to counsel depends on the "particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The lack of an advisement regarding the dangers and disadvantages of self-representation "weighs heavily against finding a knowing and intelligent waiver." Poynter v. State, 749 N.E.2d 1122, 1128 (Ind. 2001).

Here, the trial court did not advise Berry on the pitfalls of self-representation, which weighs heavily against finding a knowing and intelligent waiver. See id. However, at the time of resentencing, Berry had already been through a jury trial, sentencing hearing, direct appeal (with representation), and he appealed his sentence pro se. In addition, Berry has obtained his G.E.D. But perhaps most importantly, Berry's post-conviction counsel, who was present at resentencing, asked the trial court for permission to "stay at the table" and answer any questions Berry might have. Transcript at 1. In other words, Berry had standby counsel during the resentencing hearing.

In Logan v. State, 693 N.E.2d 1331, 1332 (Ind. Ct. App. 1998), trans. denied, where the trial court likewise did not advise the defendant of the dangers of proceeding pro se, we held that the defendant's waiver of his right to counsel was nonetheless knowing, voluntary, and intelligent. We reasoned that the trial court had advised the defendant "of the severity of the charges and the possible sentences, and provided him with the standby counsel" he had requested. See id. We concluded that the defendant's "conduct at the initial hearing and at the trial, the specific language that he used, and his

experience with the judicial system provide sufficient evidence from which the court could have determined that [defendant] waived his right to counsel or, more accurately, asserted his right to act as his own counsel." Id.

Here, Berry was well aware of the possible sentence he faced, having already been through one sentencing hearing in 2002. And he had the assistance of standby counsel available to him at resentencing. Moreover, Berry demonstrated his knowledge of legal procedure and the judicial system when he represented himself on the appeal of the trial court's denial of his motion to correct erroneous sentence, which appeal was successful. We cannot say that Berry's waiver of his right to counsel was not made knowingly, voluntarily, or intelligently.

Issue Two: Sentence

Berry contends that the trial court abused its discretion when it did not identify any mitigators and assessed too much weight to his criminal history at sentencing. And he maintains that his sentence is inappropriate in light of the nature of the offense and his character. We address each contention in turn.

Sentencing decisions lie within the sound discretion of the trial court and are reviewed only for an abuse of that discretion. Powell v. State, 751 N.E.2d 311, 314 (Ind. Ct. App. 2001). If the sentence imposed is authorized by statute, we will not revise or set aside the sentence unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B); McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001).

Berry asserts that the trial court should have assessed mitigating weight to the following: his obtaining his GED and "substance abuse certificates" while incarcerated; his dyslexia; and the fact that he was "raised in the Chicago projects for 13 years and was regularly 'whipped' by his parents." Brief of Appellant at 12. It is well settled that the finding of mitigating circumstances is within the discretion of the trial court. Hackett v. State, 716 N.E.2d 1273, 1277 (Ind. 1999). The trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Chambliss v. State, 746 N.E.2d 73, 78 (Ind. 2001). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied.

Here, Berry has not demonstrated that his proffered mitigators are both significant and clearly supported by the record. Berry does not explain why those factors should be considered mitigating, and he does not cite to case law to support his specific contentions on this issue. Moreover, our court has held that a trial court does not abuse its discretion when it declines to find a defendant's troubled childhood to be mitigating. See Rose v. State, 810 N.E.2d 361, 366 (Ind. Ct. App. 2004). Finally, as the State pointed out to the trial court at resentencing, "any substance abuse certificate and GED certificate recognized by the [Department of Correction] will give the defendant credit time[.]" Transcript of Resentencing at 12. The trial court did not abuse its discretion when it declined to identify any mitigators.

Regarding Berry's criminal history, he fails in his attempt to minimize its significance. His entire argument on this point consists of the following: "The criminal convictions alleged in the presentence investigation occurred in 1997 and 1998. One of these was a misdemeanor. Neither suggest[s] any prior violent tendencies." Brief of Appellant at 12. Berry ignores the fact that his prior felony conviction involved stolen property, which is related to the instant offense. Further, nothing in our statutory or case law suggests that a defendant's criminal history must indicate violent tendencies to be aggravating. And this court has previously held that a defendant's criminal history consisting of one felony and one misdemeanor was sufficient to support a criminal history aggravator. See Donnegan v. State, 809 N.E.2d 966, 978 (Ind. Ct. App. 2004), trans. denied. The trial court did not abuse its discretion when it identified Berry's criminal history as an aggravator.

Finally, Berry contends that his sentence is inappropriate in light of the nature of the offense and his character. In support of that contention, Berry reiterates that he has dyslexia, was abused as a child, has completed his GED and substance abuse certificates, and has a relatively minor criminal history. In addition, Berry states that he expressed remorse at resentencing. Berry directs us to page 77 of the Appendix, which includes the following statement: ". . . I have been locked up over four years on this particular case here I surely have paid a great time of regret upon this particular charge and situation as a whole and I would recommend an eight to a half [sic] which is four times [inaudible] this situation. . . ." This cursory expression of remorse is insufficient to convince us of Berry's good character.

Further, while Berry emphasizes his lack of a violent criminal history, the nature of the instant offense is violent. Berry and two other men lured their victim into a house, and Berry pointed a gun at the victim's head during the robbery. The nature of the offense reflects poorly on Berry's character and outweighs the positive steps Berry has taken to improve his life while incarcerated. We cannot say that the fifteen-year sentence is inappropriate in light of the nature of the offense and Berry's character.[1]

Affirmed.

MAY, J., and MATHIAS, J., concur.

[1] Berry also contends that "he was entitled to a jury trial on the issue of prior criminal history, because the previous history was not clear, and Berry was under no obligation to admit to prior convictions." Appellant's Brief at 16. Berry cites to Blakely in support of that contention. But our review of the resentencing transcript shows that Berry clearly admitted to the prior misdemeanor and felony convictions reflected in the presentence investigation report. As such, his contention on this issue is without merit.